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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 447

THOMAS M. SMITHER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

THOMAS M. SMITHER,
Pro se.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 447

THOMAS M. SMITHER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Thomas M. Smither, respectfully shows to this Honorable Court:

I

Summary Statement of the Matter Involved

This is an action brought in the Court of Claims of the United States, to obtain just compensation for 157.59 acres of land, taken by the United States without due process of

law and without compensation therefor; the decision of said Court in this case is based entirely upon the transcript of the evidence, which evidence the Court never heard, and upon the report of a Commissioner of said Court, who did not preside at any hearing, neither heard nor took any testimony in this case, and who predicated his report solely upon the transcript of the evidence on file in said Court, which evidence was presented in a hearing held before another Commissioner of said Court, nearly one year before the filing of said report. This case was, by order of the Court of Claims, originally referred to Commissioner Raymond T. Nagle of said Court, on June 23, 1948, with instructions to take testimony and make a report of the facts to the Court. Commissioner Nagle, however, did not make his report of the findings of fact to the Court, although he had presided at the hearing in San Francisco, California, on March 7 to March 9, 1949, where testimony was taken and evidence presented, at which hearing the later appointed Commissioner Foster, whose report was used in arriving at the decision herein, was not present. Commissioner Nagle presided at a supplemental hearing held in San Francisco on October 25, 1949, and received requests for findings of fact from plaintiff on December 16, 1949, and from defendant on January 24, 1950. Commissioner Nagle was removed from this case, before he had made his report, by order of the Court of Claims,[1] which order is herewith quoted in full:

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[1] A request that this order be included in the certified transcript of the record in this case, as part of the record as is material to the errors assigned, in accordance with the Act of Congress of May 22, 1939 (53 Stat. 752), section (a) of Rule 99 of the Court of Claims, and rule 41 of the rules of this Court, was made to the clerk of said Court of Claims, but said request was neither accepted nor filed by said clerk.

"COURT OF CLAIMS OF THE UNITED STATES

No. 48650

THOMAS M. SMITHER

v.

THE UNITED STATES

ORDER

It Is Ordered by the Court this 3rd day of February, 1950 that this case be and it is hereby referred to George H. Foster, one of the commissioners of this court, for an ascertainment and report of the facts to the court.

The commissioner shall ascertain whether both parties have closed their proof; and if not, shall notify either or both of them to produce witnesses or evidence within such reasonable time as he may prescribe. Where deemed necessary by him the commissioner shall have the witnesses summoned. He shall fix the time and place for the taking of testimony, giving notice to either side thereof; and having concluded the taking of testimony he shall make a report of the facts to the court, filing with his report the evidence adduced by the parties. In the event both parties have concluded the taking of testimony at the time of this reference the commissioner shall proceed to ascertain the facts from the evidence on file, making his report, as already stated. Upon the filing of the commissioner's report the clerk shall mail notice to the parties of the filing of the same.

Each party may have 30 days from the date of the filing of the commissioner's report to file printed exceptions thereto. Each exception, at the end thereof, shall have appropriate references to the parts of the record relied upon for its support. The plaintiff may have 15 additional days from the date of the filing of his exceptions, or a total of 45 days, within which to

file brief, and the defendant may have 30 days after the date on which plaintiff's brief is filed within which to file its brief.

The commissioner may rule upon the relevancy and admissibility of any evidence, any exceptions by either party to his rulings to be noted at the hearing by him.

All other questions are reserved.

It Is Further Ordered that the former order referring this case to Commissioner Nagle be and the same is vacated and set aside.

By the Court:

MARVIN JONES,
Chief Judge."

No explanation why this order was issued by said Court of Claims, was given to your petitioner.

The report of the new Commissioner Foster, so appointed for the first time, on February 3, 1950, was filed on February 16, 1950, and is predicated solely upon the transcript of the evidence presented in the hearing held before Commissioner Nagle, on March 7 to March 9, 1949, at which hearing Commissioner Foster was not present. Your petitioner excepted to this report of Commissioner Foster on March 17, 1950, which exception was totally disregarded by the Court of Claims. Briefs were filed and the Court of Claims rendered its decision on July 10, 1950, which decision is based upon said report of Commissioner Foster and upon the transcript of the evidence presented before Commissioner Nagle, which evidence neither Commissioner Foster nor said Court ever heard. A motion for a new trial was filed on July 30, 1950, on the grounds that Commissioner Foster did not have jurisdiction to make the report of the findings of fact, for the reason that he never heard the evidence, never saw the witnesses, and was totally unable to pass upon their credibility, and that the decision herein was, therefore, made without due process of law. This motion was overruled by the Court of Claims on October 2, 1950.

II

Grounds On Which Jurisdiction of This Court Is Invoked

The provision of the Fifth Amendment to the Constitution of the United States, that no person shall be deprived of property without due process of law; nor shall private property be taken for public use without just compensation.

III

Questions Involved

1. Is not a decision rendered by the Court of Claims on the basis of a transcript of the evidence, which evidence said Court never heard, and upon the report of the findings of fact made by a commissioner of said Court, who fixed no time nor place for taking testimony, who heard no evidence, who saw no witnesses and who concluded no taking of testimony, but based his report solely upon the transcript of the evidence taken before another commissioner of said Court in a hearing at which the commissioner making said report was not present, contrary to the provision of the Fifth Amendment to the Constitution of the United States, forbidding the taking of property without due process of law?

2. Whether, even if the report of the findings of fact had been made by a commissioner of the Court of Claims who had personally heard the evidence, and the decision of said Court had been made upon said report, the neglect to ascribe a special value for reservoir use to land taken by the United States, where the transcript of the evidence shows that said land is particularly suitable for such use, and there is a proven and admitted possibility and a reasonable probability that the land could and might be used for such purposes by other agencies than the United States Government, is in conflict with the principle of just compensation as set forth in decisions of this Court?

3. Whether, even if the report of the findings of fact had been made by a commissioner of the Court of Claims who had personally heard the evidence, and the decision of said Court had been made upon said report, the neglect to ascribe an enhanced value to land taken by the United States, lying outside of the fixed boundary line of a reservoir project, as authorized and defined by Congress, where the transcript of the evidence shows that said land was taken more than eight years after the Act of Congress authorizing said project and defining the boundary thereof had been enacted, during which time said land had acquired a special value for recreational and resort purposes, is in conflict with the principle of just compensation as set forth in decisions of this Court?

IV

Reasons Relied On for the Allowance of the Writ

1. The Court of Claims of the United States has rendered a decision in violation of the due process of law provision of the Fifth Amendment to the Constitution of the United States.

2. In rendering its decision the Court of Claims of the United States, erroneously decided questions arising under said Fifth Amendment to the Constitution of the United States adversely to petitioner's contentions, and it is believed, contrary to the decisions of this Court, and to the purpose and intent of Congress.

Wherefore your petitioner respectfully prays that this petition for a writ of certiorari to review the judgment of the Court of Claims of the United States should be granted.

Respectfully submitted,

THOMAS M. SMITHER,
Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 447

THOMAS M. SMITHER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent

BRIEF OF PETITIONER

I

Grounds On Which Jurisdiction of This Court Is Invoked

The provision of the Fifth Amendment to the Constitution of the United States, that no person shall be deprived of property without due process of law; nor shall private property be taken for public use without just compensation.

II

Statement of the Case

This action was brought in the Court of Claims on April 30, 1948, to recover just compensation from the United

States, for the taking of 157.59 acres of land lying partly inside of and partly outside of the fixed boundary line of the reservoir created by the Shasta Dam, of the Central Valley project of the Bureau of Reclamation, United States Department of the Interior, in the County of Shasta, State of California. In 1921 this damsite and reservoir basin were well known as suitable sites for such uses, and the feasibility of the sites was the subject of many subsequent reports by various commissions and engineers of the State of California. It was found in the official report of the State of California, prepared by Lester Ready, an outstanding hydro-electric engineer of California, that the Shasta dam project was economically feasible and could be constructed by the state or by a district or by a private company. In 1935 the State of California proposed to undertake the construction of this project, and endeavored to finance this construction by the sale of bonds to the public, however, the lack of investment money due to the severe financial depression existing in 1935, defeated this attempt to raise the necessary funds. The United States Government first took cognizance of the project in the Emergency Relief Appropriation Act of 1935 (49 Stat. 115). The construction of Shasta dam in accordance with the plans as set forth in Rivers and Harbors Committee Document Numbered 35, Seventy-third Congress, was authorized by the Act of Congress of August 30, 1935 (49 Stat. 1028, 1038). The boundary line of the reservoir was definitely fixed by the margin of the body of water impounded by the 420 foot dam specified in said plans and authorized in said Act of Congress. No change in the height of the specified 420 foot dam was made in any of the subsequent acts of Congress concerning said Central Valley project.

Eight acres of the subject land was above the maximum water surface elevation of said reservoir impounded by said

420 foot dam, which elevation was 1000 feet above sea level. This eight acres of subject land, lying outside of the said fixed boundary line of the reservoir, was later taken by the United States, due to the fact that a 480 foot dam was then completed, which dam raised the water surface of the impounded reservoir to an elevation of 1065 feet above sea level, thereby flooding and submerging practically all of said eight acres of subject land.

Evidence was presented by petitioner, through competent expert witnesses of outstanding reputation, as to the market value of that portion of subject land within the reservoir basin as fixed by its authorized boundary line, and also as to that portion of subject land later taken, which was outside of said authorized reservoir boundary line. This evidence was not heard by the Court of Claims nor by the commissioner of said court, who made the findings of fact, as has been fully set forth in the petition for writ of certiorari filed herein.

III

Assigned Errors as Are Intended to Be Urged

1. The Court of Claims has erred in making a decision based upon the transcript of the evidence, which evidence it did not hear, and upon the report of a commissioner of said court, who heard no evidence, who saw no witnesses and who concluded no taking of testimony, but based his report of the findings of fact solely upon the transcript of the evidence taken at a hearing held before another commissioner of said court, at which hearing the commissioner filing said report was not present.

2. Even if the report of the findings of fact had been made by a commissioner of the Court of Claims who had personally heard the evidence, and the decision of said Court had been made upon said report, the Court of Claims

has erred in making its decision and judgment as to the market value of subject land taken by the United States, in that it has neglected to include in said market value the special value said subject land had for reservoir purposes.

3. Even if the report of the findings of fact had been made by a commissioner of the Court of Claims who had personally heard the evidence, and the decision of said Court had been made upon said report, the Court of Claims has erred in making its decision and judgment as to the market value of that portion of subject land taken by the United States, lying outside of the authorized reservoir, in that it has neglected to include in said market value the enhanced value of said land, due to its suitability and availability for recreational and resort uses.

IV

Argument

1. It has been held in numerous decisions of this Court, that a decision in any case must, in order to accord with due process of law, be rendered upon the testimony taken in a full and fair hearing and that the findings of fact must be made by the trier of facts, who has seen and heard the witnesses. None of these requirements were met by the Court of Claims in rendering its decision herein, and your petitioner has actually had no hearing in this case whatsoever. In St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 73, this Court said:

> "The inexorable safeguard which the due process clause assures is not that a court may examine whether the findings as to value or income are correct, but that the trier of facts shall be an impartial tribunal; that no finding shall be made except upon due notice and opportunity to be heard; that the procedure at

the hearing shall be consistent with the essentials of a fair trial; and that it shall be conducted in such a way that there will be opportunity for a court to determine whether the applicable rules of law and procedure were observed."

In Morgan v. United States, 298 U.S. 468, 480, this Court said:

"There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such. United States v. Abilene & Southern Ry. Co., supra (262 U.S. 274). Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. Findings based on the evidence must embrace the basic facts which are needed to sustain the order. * * * The requirement of a "full hearing" has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of facts. The "hearing" is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The "hearing" is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given."

In Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 304, 305, this Court said:

"that the 'inexorable safeguard' (St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 73) of a fair and open hearing be maintained in its integrity. Morgan v. United States, 298 U.S. 468, 480, 481; Inter-

> state Commerce Comm'n. v. Louisville & N.R. Co., supra. The right to such a hearing is one of 'the rudiments of fair play' (Chicago, M. & St. P. Ry. Co. v. Polt, 232 U.S. 165, 168) assured to every litigant by the Fourteenth Amendment as a minimum requirement. West Ohio Gas Co. v. Public Utilities Comm'n. (No. 1), (No. 2), supra; Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673, 682. Cf. Norwegian Nitrogen Co. v. United States, supra. There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."

In Morgan v. United States, 304 U.S. 1, 14, 15, this Court said:

> "the liberty and property of the citizen shall be protected by the rudimentary elements of fair play. These demand 'a fair and open hearing'—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an " 'inexorable safeguard'."

In Smith v. Dental Products Co., 168 F. (2d) 516, (C.C.A. 7, 1948), a case in which the facts are almost identical with those in this case, it was held, that where master died after testimony had closed but before he made a report and district court did not see witnesses, the rendition of judgment on basis of a transcript of testimony before master was not in accord with due process, and that district court, in order to afford parties a hearing within contemplation of due process, should have directed a trial de novo before another master or before itself; reference being made to the above cited cases decided by this Court.

2. The Court of Claims concedes that the special value that land has because of its adaptability to a particular

use is properly considered in determining just compensation for its taking, Boom Co. v. Patterson, 98 U.S. 403. The transcript of the evidence herein clearly shows that subject land had this adaptability, and had it long before any use of the land for such purposes, was contemplated by the United States, this fact is undisputed. The Court of Claims, however, states that if there is no reasonable probability that such special value could be realized by anyone other than the expropriating authority, then such special value is not an element to be considered; it relies upon the decision of this Court in Olson v. United States, 292 U.S. 246, to sustain its finding that the reservoir value of plaintiff's land, cannot, therefore, be considered as affecting its market value. Your petitioner does not disagree with the holding of this Court in the Olson case, but wishes to point out that the facts and conditions in said case are entirely dissimilar to those in this case, and the principles set forth in said Olson case are inapplicable in this case. There a large existing lake lying in both the United States and Canada was involved, necessitating the negotiation of a treaty between the United States and Great Britain before any project could be undertaken, this Court quite properly held that the negotiation of such a treaty between two independent nations by anyone other than the expropriating authority was improbable, and therefore, the special value of the land for reservoir use could not be considered in its market value. No such conditions existed in this case, here a well known and readily available reservoir site entirely within the state of California, was open to development by the state, by a district or by a private company. It is conceded by the United States that a private company could finance and build the Shasta Dam project, as was set forth by it in its request for findings of fact submitted to Commissioner Nagle, in the following

statement.[2] "The Pacific Gas and Electric Company is the only possible private power company in Northern California with sufficient capital and distribution system to undertake the Shasta Dam project."

The transcript of the evidence shows that due to the keen competition between said Pacific Gas and Electric Company and the U. S. Bureau of Reclamation in the sale and distribution of electric power throughout northern California, there was a reasonable probability that the said Pacific Gas and Electric Company, at the time of the taking in 1944, would have undertaken and completed the Shasta Dam project. The scarcity of dam and reservoir sites, at the time of the taking in 1944, and the competition between private power companies and the United States Government in the acquisition of such sites is shown to be a definite factor in determining the market value of subject land, by the testimony of an expert witness of outstanding reputation and extensive engineering experience in the development of similar projects in California.

The further decisions in United States ex rel. Tennessee Valley Authority, 319 U.S. 266, 275 and Continental Land Co. v. United States, 88 F. (2d) 104, cert. den., 302 U.S. 715, relied upon by the Court of Claims, are likewise inapplicable in this case, as the facts and conditions in these cases are entirely dissimilar to those in this case.

3. In United States v. Miller, 317 U.S. 369, 374, 376, 378, this Court has established definite rules to be followed in eminent domain proceedings, which rules are especially applicable to the facts and conditions in this case. The

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[2] A request that this statement be included in the certified transcript of the record in this case, as part of the record as is material to the errors assigned, in accordance with the Act of Congress of May 22, 1939 (53 Stat. 752), section (a) of rule 99 of the Court of Claims, and rule 41 of the Rules of this Court, was made to the clerk of said Court of Claims, but said request was neither accepted nor filed by said clerk.

Court of Claims in its decision in this case has not considered at the time of the taking in 1944, the enhanced value of the eight acres of land subject, above and outside of the fixed boundary line of the reservoir authorized by Congress, which land was not, from the beginning of the project included in the necessary lands to be taken. The 420 foot dam fixed and authorized by Congress, limited the elevation of the water surface of the impounded reservoir to an elevation of 1000 feet above sea level, the margin of this water surface accurately determined and fixed the boundary line of the lands necessary for said reservoir. In Kerr v. South Park Commissioners, 117 U.S. 379, the ruling of this Court was, that where the lines of the park had, in the beginning, been fixed, property lying outside the boundaries of the park, and not intended to be taken, would be dissimilar from that lying within it, the one gaining value by proximity and the other gaining nothing from the fact that it was to be taken from its owner. The said eight acres of subject land definitely fall within the category of property lying outside of the lines of the Shasta Dam project at the time the Government was committed to it, by its final and definite authorization of said project by the Act of Congress of August 30, 1937. In United States v. Miller, above, this Court said on page 374;

> "Respondents correctly say that value is to be ascertained as of the date of taking.";

and on page 376 this Court said:

> "If a distinct tract is condemned, in whole or in part, other lands in the neighborhood may increase in market value due to the proximity of the public improvement erected on the land taken. Should the Government at a later date, determine to take these

> other lands, it must pay their market value as enhanced by this factor of proximity.'';

and on page 378 this Court repeated and confirmed the ruling in Kerr v. South Park Commissioners, above.

The Court of Claims concedes that a 420 foot dam was specified and authorized by Congress and that the size of the impounded reservoir was increased by the finally constructed 480 foot dam, which raised the water surface elevation of the impounded reservoir to 1065 feet above sea level; however, it decided that as there was only one 480 foot dam constructed, that there was only one project and one taking, and that as said 480 foot dam was worked on continuously until its completion that there were no separate takings, for which reason no enhanced value should be attached to the additional land taken. This decision was made despite the fact that the boundary line of the reservoir had been fixed by the Government, in its final and definite authorization of the project by the Act of Congress of August 30, 1937. If this reasoning of the Court of Claims be correct, it is obvious that any Government Bureau could, by merely increasing the size of a project after it had been fixed and authorized by Congress and constructing said project without interruption, take any amount of adjoining land it desired outside the fixed boundary line, without payment of any enhanced value for said land. Such a taking without the payment of enhanced value would obviously be in direct conflict with the principle of just compensation as set forth in the rulings of this Court, hereinabove cited.

The transcript of the evidence shows that from 1935 to the time of the taking in 1944, the eight acres of subject land outside of the fixed boundary line of the authorized reservoir, had attained, in the minds of all prospective purchasers, who create the market value of land, a special

value for recreational and resort purposes. The adaptability of the said eight acres of land for such purposes and its market value, was set forth in the testimony of a competent expert witness of twenty-eight years experience in buying and selling lands in Shasta County, California, who had seen and examined said land.

Wherefore your petitioner respectfully prays that the judgment of the Court of Claims of the United States be reversed and remanded by this Honorable Court, in order that the report of the findings of fact may be made by a commissioner of said Court of Claims, who has seen and heard the witnesses testify, that the reservoir value may be included in the market value of that portion of subject land inside of the fixed boundary line of the Shasta Dam project, and that the enhanced value may be included in the market value of that portion of subject land outside of the fixed boundary line of said Shasta Dam project, and that your petitioner may have such other and further relief as to this Honorable Court may seem meet and just.

Respectfully submitted,

THOMAS M. SMITHER,
Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 447

THOMAS M. SMITHER, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 6-8) is reported at 91 F. Supp. 582.

JURISDICTION

The judgment of the Court of Claims was entered on July 10, 1950 (R. 9). A motion for a new trial was filed on July 31, 1950 and denied on October 2, 1950 (R. 9). The petition for a writ of certiorari was filed December 11, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1255.

QUESTIONS PRESENTED

1. Whether the finding that the value of petitioner's land in January 1944 was $1,575.90 is erroneous.

2. Whether the findings of the Court of Claims are vitiated because the commissioner who reported to the court did not hear the evidence.

STATUTES AND RULES INVOLVED

The relevant statutory provisions relating to the procedure in the Court of Claims and the material rules of that Court are set out in the argument, *infra,* pp. 5-6.

STATEMENT

This petition seeks review of a judgment of the Court of Claims awarding $1,575.90 plus interest as just compensation for the taking of some 157 acres of land in Shasta County, California. The land was permanently flooded in January 1944 by the operation of Shasta Dam, resulting, as the Court of Claims found (Fdg. 5, R. 5), in a taking of a fee simple interest therein. The disputed questions relate solely to the market value of the tract. The facts relating thereto, as found by the Court of Claims, may be briefly summarized as follows:

This tract was steep rolling mountain land covered with brush and a scattering of scrub oak and bull pines. It was very poor pasture land and lacked road access. (Fdg. 3, R. 4.) Petitioner contended that the tract had special value as a site for

a reservoir and also special value for recreational or resort purposes on the theory that a 420 foot dam would have left eight acres unflooded. After describing the Shasta Dam project which involved the acquisition of some 60,000 acres of land, a large part of which was public domain, and the relocation of highways, railroads and transmission lines, the court found that there was no reasonable probability that any private concern would have undertaken the Shasta Dam project (Fdg. 6, R. 5-6). As to the claim for recreational or resort value for the eight acres, the court found that although a 420-foot dam was first proposed, as the plans finally developed and the contract let, a 480-foot dam was provided for, a map prepared by a local government representative in 1938 showed that the tract here involved would be part of the reservoir and its acquisition was contemplated from that date (Fdg. 4, R. 4-5).[1]

The court's opinion (R. 6-8) concluded that the land did not have special value for reservoir purposes because there was no reasonable probability that such a project would be built by private enterprise. It also concluded that the eight acres did not have special value as being near, but not part of, the reservoir because there was only a single project which included that tract and because the

[1] Condemnation proceedings were not instituted because it was thought that, being tax delinquent, California law permitted use of this land for reclamation purposes without charge.

court was not convinced that the smaller dam would have created special recreational value as claimed by petitioner.

While the record is silent on the subject, the fact is, as stated by petitioner (Pet. pp. 2-4), that after the evidence was taken the case was transferred from Commissioner Nagle to Commissioner Foster, who made the report. The order does not state the reason for this action but it was due, we believe, to illness of Commissioner Nagle, which later proved fatal.

ARGUMENT

1. In arriving at its determination of value, the Court of Claims correctly applied the controlling principles of law. A special value for this land for use for reservoir purposes could be considered only if the construction of such a project was so reasonably probable that the market value of the land was thereby enhanced. *Olson* v. *United States,* 292 U.S. 246; *United States ex rel. T.V.A.* v. *Powelson,* 319 U.S. 266; *Continental Land Co.* v. *United States,* 88 F. 2d 104 (C.A. 9), certiorari denied, 302 U.S. 715. The magnitude of the project, the necessity of acquiring a large area of public domain and of relocating highways, railroads and transmission lines confirm the rejection of petitioner's assertion of existence of a reasonable probability that a private power company would construct the project.

The findings of the court likewise conclusively

dispose of the attempt to include recreational value in the award. As the court stated (R. 8), there was only a single project and a single taking, hence the language from *United States* v. *Miller*, 317 U.S. 369, concerning two distinct takings (Pet. pp. 15-16) is irrelevant here. Moreover, there was not sufficient evidence to convince the court that a smaller dam would have created special recreational value. As the court found (Fdg. 7, R. 6): "In the few transfers that were effected [in the vicinity], the transactions did not reflect any special value in the land as a reservoir basin or for recreational or resort purposes."

2. Although the fact does not appear in the record, petitioner argues that the judgment is vitiated because the commissioner who presided at the taking of the evidence did not make the report.[2] The argument misconceives the requirements applicable to commissioners of the Court of Claims. The statutes authorizing commissioners provide that they shall "in accordance with the rules and orders of the court * * * receive evidence and report findings of fact and recommendations for conclusions of law in cases assigned to them" (28 U.S.C. 792), and that "The rules of the court shall provide for a finding and report of facts by a commissioner, and when directed by the court his recommendations for conclusions of

[2] Our file does not indicate that any objection was made by petitioner to the change of commissioners until after the report had been made. Cf. Pet. p. 4.

law, to be filed in court with the testimony upon which the same is based, and for opportunity to file exceptions thereto, and a hearing thereon within such reasonable time as the court's rules or order may prescribe. This section shall not prevent the court from passing upon all questions and findings regardless of whether exceptions were taken before a commissioner" (28 U.S.C. 2503).

The fact that commissioners' recommendations are advisory only and that the findings of fact are made by the court is made apparent by the rules of the Court of Claims. See especially Rule 75 that where both parties request it, "the court will make and enter special findings of fact as part of its judgment" and Rule 76 that when a commissioner has made a report the party requesting a special finding of fact shall follow a prescribed form. The court rules seem to contemplate the procedure followed here, since Rule 40 provides "When a case has been referred to a commissioner of the court and proof has been closed by both parties, the commissioner shall proceed to ascertain the facts, including ultimate facts, considered by him to be established by the evidence, and make a report of his findings to the court within a reasonable time." And Rule 41 refers to procedure "If the proof has not been closed at the time of the reference." See also Rule 51 governing instances where a commissioner is unable to take testimony in a case.

In view of the express reference in the pro-

visions of Title 28 *supra* to court rules, there can be no question as to authority for their adoption. The authority of Congress in the matter is equally clear, since it was legislating as to the procedure under which the United States can be sued. Petitioner's claim that the procedure prescribed violates due process of law plainly, therefore, lacks merit.

In any event, there is not, as petitioner urges, an inexorable rule that the fact finder must personally hear the testimony. In *Labor Board* v. *Mackay Co.*, 304 U.S. 333, at the conclusion of the testimony but prior to oral argument before the examiner the proceeding was transferred to Washington and heard by the Board. This Court held that failure to follow the usual procedure of submission of a tentative report by the trial examiner did not constitute denial of a full and adequate hearing, saying (p. 351): "The Fifth Amendment guarantees no particular form of procedure; it protects substantial rights. Compare *Morgan* v. *United States,* 298 U.S. 468, 478." So here, petitioner was not deprived of any opportunity to present evidence. He had ample opportunity to argue his position both by briefs and by personal appearance before the Court of Claims. As the findings and opinion show, the court below based its conclusions upon the evidence submitted and contentions urged; hence, the present case is entirely different from the situation presented in *Morgan* v. *United States,* 298 U.S. 468, and *Ohio*

Bell Telephone Co. v. *Public Utilities Commission,* 301 U.S. 292, relied upon by petitioner (Pet. pp. 11-12).

In *National Labor Relations Board* v. *Stocker Manufacturing Company* (C.A. 3, No. 10,262, decided November 28, 1950), it was held, following the *Mackay* case *supra,* that the making of findings and recommendations by a second trial examiner upon the transcribed record, after the examiner who received the testimony had died, did not violate due process or applicable statutes. Decisions seemingly to the contrary are: *S. Buchsbaum & Co.* v. *Federal Trade Commission,* 153 F. 2d 85 (C.A. 7) and *Smith* v. *Dental Products Co.,* 168 F. 2d 516 (C.A. 7). However, in the *Buchsbaum* case a writ of certiorari was granted and the case was remanded for consideration of other errors assigned, a motion for leave to file a waiver of the assigned error on the procedural question having been granted. *Federal Trade Com.* v. *S. Buchsbaum & Co.,* 328 U.S. 818. The *Smith* case makes no mention of this Court's decision in the *Mackay* case, and the primary ground for the decision was that no findings of fact and conclusions of law had been made as required by the Federal Rules of Civil Procedure. Moreover, the court was there discussing a hearing before a Master, whose findings are to be approved unless they are clearly erroneous (Rule 53(e)(2), F.R.C.P.). The case is, therefore, distinguishable from the present one where the

findings are ultimately made by the court. Finally, it should be noted that neither a jury trial nor any other particular procedure is required in proceedings to determine the value of property taken by exercise of the power of eminent domain. See summary of Mr. Justice Brandeis in *St. Joseph Stock Yards Co.* v. *United States,* 298 U.S. 38, 78-79. There is nothing to indicate that there were presented questions concerning the demeanor of witnesses, or that petitioner suffered prejudice from the procedure followed by the court below.

CONCLUSION

The decision of the court below is correct, and the case does not warrant review. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 447

THOMAS M. SMITHER,
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THE UNITED STATES OF AMERICA,
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Reply Brief of Petitioner

On Petition for a Writ of Certiorari to the United States Court of Claims

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The quotation of Rule 40 of the Court of Claims as set forth on page 6 of the brief in opposition is incomplete, the notation to see Rules 45 and 46, which appears as the concluding sentence of Rule 40, has been omitted. This reference to Rules 45 and 46, and the cross reference in Rule 45 to see Rule 40, indicates that the provisions of Rules 40, 45 and 46 must be considered together in order to arrive at their full meaning.

The Act of Congress of February 24, 1925 (43 Stat. 964), authorizing the appointment of commissioners of the Court of Claims states in part as follows: "That to afford the Court of Claims needed facilities for the disposition of suits brought therein said court is hereby authorized and empowered to appoint seven competent persons, to be known as commissioners, who shall attend the taking of or take evidence in cases that may be assigned to them severally by the court and make a report of the facts in the case to the court. Any commissioner shall proceed under such rules and regulations as may be promulgated by the court and such orders as the court may make in the particular case, and may have and perform the general duties that pertain to special masters in suits in equity. He may fix the times for hearings, administer oaths, examine witnesses, and receive evidence." In view of the provision of the above Act, that commissioners shall attend the taking of or take evidence in cases, there is no ambiguity in the meaning of Rules 40 and 41, as is implied on page 6 of the brief in opposition. Rules 40½(d), 42 and 44 of the Court of Claims, indicate that commissioners shall take, hear, rule upon and receive evidence, in conformity with the requirements of the above Act. It seems unnecessary to cite authorities to support the well settled principle that the rules of any court of the United States must conform to the provisions of the Constitution of the United States.

In view of the provision of said above Act, that a commissioner may have and perform the general duties that pertain to special masters in suits in equity, the attempt to distinguish the case of *Smith v. Dental Products Co.*, 169 F.2d 516, set forth on pages 8 and 9 of the brief in

opposition, lacks merit. The commissioners of the Court of Claims are, in fact, trial judges so far as the facts are concerned.

In reply to the footnote at the bottom of page 5 of the brief in opposition, stating that petitioner failed to object to change of commissioners until after the report had been made, it will be noted that Commissioner Foster was appointed on February 3, 1950 and filed his report on February 16, 1950. This short interval of time when considered together with the length of time required for communications from Washington, by regular mail, to be delivered to petitioner in San Francisco, shows that petitioner did not have sufficient time to prepare and forward an objection to the change of commissioners before the said report was filed.

The holding by this Court in *Labor Board v. Mackay Co.*, 304 U.S. 333, cited on page 7 of the brief in opposition is inapplicable in this case, as the facts and conditions are entirely dissimilar to those in this case. The National Labor Relations Board is not a court, and its proceedings are administrative rather than judicial; Section 10(b) of the National Labor Relations Act (49 Stat. 449, 454), provides that "the rules of evidence prevailing in courts of law and equity shall not be controlling." The holding in *National Labor Relations Board v. Stocker Mfg. Co.*, 185 F.2d 451 (C.C.A. 3, 1950), cited on page 8 of the brief in opposition, is likewise inapplicable in this case, for the same reason.

Respectfully submitted,

THOMAS M. SMITHER,
Petitioner.